Supreme Court, U.S.
FILED
JAN 24 2003
OFFICE OF THE CLERK

No. 02-813

IN THE

Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,

Petitioner,

v.

M/V HYUNDAI LIBERTY, *in rem*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioner, one additional party should be mentioned. Glory Express, Inc. was a defendant/ appellee in the proceedings below. The claims against Glory Express were resolved by summary judgments by the district court, which found Glory Express liable to Petitioner, but also found that its liability was limited by the terms of the Glory Express bill of lading and the Carriage of Goods by Sea Act. Petitioner appealed the summary judgment limiting Glory Express' liability. On appeal, the Ninth Circuit affirmed the propriety of the summary judgment, finding that Glory Express was entitled to limit its liability. Petition, App. A at 15-16.

The M/V HYUNDAI LIBERTY is owned by Hyundai Merchant Marine, Co., Ltd., Seoul, Korea. The only company that owns 10% or more of Hyundai Merchant Marine, Co., Ltd.'s stock is Hyundai Elevator Co., Ltd.

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Respondent M/V HYUNDAI LIBERTY respectfully requests that this Court deny the petition for writ of certiorari filed by Green Fire & Marine Insurance Co., Ltd.

REASONS FOR DENYING THE PETITION

The question presented by the Petition is whether the court of appeals erred "in holding that NVOCCs are not shippers but, as a 'commercial norm,' are agents of the shipper when they contract for regulated transportation with ocean common carriers." Pet. at *i*. The question presented by Petitioner fails to accurately reflect the actual holding by the Ninth Circuit.

In its Petition, Petitioner expands the Ninth Circuit's holding, claiming that the court of appeals held the non-vessel-operating common carrier (NVOCC) with which Petitioner's subrogor contracted to ship the subject cargo "not" to be a "shipper" in relation to the ocean common carrier, Hyundai Merchant Marine Co., Ltd. (Hyundai), the owner of Respondent M/V HYUNDAI LIBERTY. In fact, the Ninth Circuit made no such finding. Rather, the Ninth Circuit, based on "the facts of this case" (Pet. App. 8) and on the commercial role of an NVOCC, found that the NVOCC was acting as an agent for Petitioner's subrogor when it accepted the carrier's bill of lading. The court of appeals did not hold that the NVOCC was not a shipper in its relationship with the ocean carrier. The parade of horribles envisioned by Petitioner, with claims such as the ruling widens "the judicial redefinition of the statutory role and status" of NVOCCs and "has the potential to frustrate the national maritime policy behind the regulation of NVOCCs' transactions with shippers and ocean common carriers,"[1] arises from a ruling

1. Petitioner even goes so far as to argue that the Ninth Circuit's holding could potentially result in weapons of mass destruction (Cont'd)

that Petitioner created, not from the opinion issued by the Ninth Circuit.

Neither the Ninth Circuit's actual ruling, nor the record below, raise the question presented by the Petition. The ruling is not in conflict with the Shipping Act of 1984 and the case has no far-reaching maritime statutory implications. Petitioner has distorted the ruling in an attempt to make a significant case out of a simple cargo damage case between a subrogated insurer, an NVOCC, and an ocean common carrier. The Ninth Circuit's holding is proper in all respects and Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

ARGUMENT

I.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

Contrary to the record, Petitioner states that there was no evidence that the NVOCC, Glory Express, Inc. (Glory Express), acted as the agent of Petitioner's subrogor, Doosan Corporation (Doosan), in procuring a vessel to carry Doosan's goods. (Pet. at 8.) However, ample evidence exists in the record to support the Ninth Circuit's finding that Glory

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(Cont'd)

reaching terrorists in this Country. Pet. at 21-22. The law referenced by Petitioner not only fails to lend any assistance to the Petition, but is also inappropriately cited since it was not in existence at the time the Ninth Circuit rendered its opinion. *See Miller v. Fairchild Industries*, 885 F.2d 498, 509 (9th Cir. 1989).

Express was acting as Doosan's agent when it made arrangements with the ocean carrier, Hyundai, to transport Doosan's cargo and accepted Hyundai's bill of lading issued in connection with the ocean transportation.

Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1 (1958); *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 373 (9th Cir. 1974). The existence of an agency relationship requires "a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent to so act." Restatement (Second) of Agency § 15 (1958). The authority of the agent may be created by express written agreement or other conduct of the principal. *See* Restatement (Second) of Agency § 26 (1958). An agency relationship may be proved "by circumstantial evidence, apparent relations, and the conduct of the parties." *Hoechst Celanese Corp. v. M/V TRIDENT AMBER*, 1992 WL 179219 *5, 1992 A.M.C. 2769, 2776 (S.D. Ga. 1992).

While the scope of agency is limited by the authority given by the principal, the agent nevertheless has the authority to perform acts which are incidental or necessary to the agent's performance of its duties. *See Lux Art Van Serv., Inc. v. Pollard*, 344 F.2d 883, 887 (9th Cir. 1965); Restatement (Second) of Agency § 35 (1958). The Restatement expressly contemplated the situation where an agent may exercise its incidental authority to enter into contracts for the principal:

> Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is

> incidental to the transaction, usually accompanies such a transaction, or is reasonably necessary to accomplish it.

Restatement (Second) of Agency § 50 (1958).

Petitioner's subrogor, Doosan, contracted with Glory Express to transport the cargo from Busan, Korea, to Los Angeles, California. (Pet. at 4). Glory Express issued three bills of lading to Doosan to cover the carriage. Each of Glory Express' bills of lading identifies Doosan as the shipper and the HYUNDAI LIBERTY as the "exporting Carrier." (Pet. App. 3) In carrying out its duties to Doosan, Glory Express, through Streamline Shippers Association of which it was a member, made arrangements with Hyundai for the actual ocean carriage. (Pet. App. 3; Pet. at 4-5).

The bills of lading between Glory Express and Doosan expressly provided that Glory Express would arrange for the carriage of the cargo on board the HYUNDAI LIBERTY. (Pet. App. 10). The Glory Express bills of lading further provided that Glory Express had the authority to use whatever form of transportation it thought was necessary to transport the goods. (Pet. App. 10-11).

Petitioner comments that there was no evidence that Doosan "needlessly duplicated its contract with Glory Express by additionally contracting with Hyundai Merchant Marine — which would have obligated Doosan to pay twice for shipping the goods once" (Pet. at 8), inferring that the Ninth Circuit held Glory Express to be Doosan's general agent. Again, this is not what the court of appeals held. In fact, the Ninth Circuit opinion specifically notes that it does "*not* mean to suggest that the relationship between Glory

Express and Doosan was one of agent and principal for all purposes." (Emphasis added). (Pet. App. 10, at note 5).

The Ninth Circuit's opinion is much less complex and far-reaching than Petitioner represents. The Panel held, simply, that for purposes of fulfilling its duties to Doosan, Glory Express had the duty and authority to ship the cargo on the HYUNDAI LIBERTY, which necessarily included the duty and authority to enter into contracts with other carriers to fulfill that obligation to Doosan. (Pet. App. 9). As this Court has previously held, it does "not grant a certiorari to review evidence and discuss particular facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925).

II.

THE NINTH CIRCUIT'S RULING DOES NOT CONTRAVENE THE SHIPPING ACT OF 1984

In an attempt to attract this Court's attention, Petitioner alleges that the Ninth Circuit's ruling is directly at odds with the Shipping Act of 1984. This contention is without merit. Petitioner ignores the Ninth Circuit's opinion, in which the court of appeals expressly adopts the Act's definition of an NVOCC as "a shipper in its relationship with an ocean common carrier." (Pet. App. 8, quoting 46 U.S.C. app. § 1702(17)(B)). The opinion clearly distinguishes the court's findings concerning the relationship between the NVOCC and the shipper and the relationship between the NVOCC and the ocean carrier. Accordingly, the opinion does not conflict with the Shipping Act of 1984. Petitioner has undertaken to expand the scope of the ruling as a means to fashion a conflict with the Act in an attempt to overcome unfavorable holdings by both the district court and court of appeals.

III.

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS BY OTHER CIRCUITS

Contrary to Petitioner's argument, the Ninth Circuit did not find "as a matter of law" (Pet. at 22) that an NVOCC is the "agent" of the shipper with whom it contracts. The Ninth Circuit found that "the commercial role of an NVOCC, as well as the facts of this case, lead to the conclusion that Glory Express was acting as Doosan's agent when it accepted the Hyundai bill of lading." (Pet. App. 8). The Ninth Circuit specifically stated:

> Nothing in the record suggests that the relationship between Doosan and Glory Express deviated from that commercial norm. To the contrary, the record shows that Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe. [footnote stating that this agency was not "for all purposes."]

(Pet. App. 10).

While the Ninth Circuit opinion states that "in general" an NVOCC is considered to act as an agent for the cargo's owner (Pet. App. 11), the court of appeals relied throughout its opinion on the record below. Again, the Petition should not be granted because to do so would place this Court in a position of having to review evidence and discuss particular facts. *United States v. Johnston*, *supra*, 268 U.S. at 227, 45 S. Ct. at 497.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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